United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-2047

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NOS. 74-2047 and 74-2127

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RICHARD HUSS and JEFFREY SMILOW,

Defendants-Appellants

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appellants hereby move, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, for rehearing of the order entered in the above-captioned case on November 27, 1974, summarily affirming their convictions, or, alternatively, for rehearing en banc of the said appeal, and as grounds therefor state as follows:

1. This is an appeal from criminal contempt convictions of two teen-aged men who were subpoenaed by the government to testify in a federal criminal prosecution against members of the Jewish Defense League and who refused to give testimony citing their religious convictions and the claim that they were the victims of illegal investigative activity.

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After a trial lasting half a day during which no defense was presented, they were found guilty by a jury and sentenced to one-year prison terms.

2. The principal issue presented on this appeal was whether the appellants could be foreclosed in a criminal contempt prosecution by their counsels' failure, in a prior civil contempt proceeding, properly to raise the issue of electronic surveillance and other unlawful government activity. When the appellants' application for release on bail was heard by a panel of this Court on August 13, 1974 (Circuit Judge Oakes, and District Judges Frankel and Kelleher), the prosecution argued that the appeal was frivolous, and bail should be denied. The panel sitting on August 13, indicated during oral argument of the bail application and by their subsequent order that the issue whether res judicata would bar defendants in a criminal action from raising issues they had not properly presented in a civil contempt proceeding was not an insubstantial one. When this case came up for argument, however, the panel sitting on November 25 (Circuit Judge Timbers, Retired Associate Justice Clark, and Retired Circuit Judge Moore) rejected the appeal summarily. This difference of view on the substantiality of the central legal issue points up the inequity of the panel system and warrants examination of the important question presented in this case by the entire court of active judges.

3. Indeed, the government, recognizing the force of appellants' arguments with respect to the doctrine of res judicata, did not try to defend the decision of the District Court on that ground. Instead, in its brief -- received by appellants' counsel less than one week before the argument -- the government asserted that an individual who is directed to testify may assert no defense to that court order under the United Mineworkers doctrine. See United States v. United Mineworkers of America, 330 U.S. 258, 293 (1947), and pp. 6-8 of the Brief for the United States in this case. Because of the shortness of time before oral argument and the fact that this contention had not previously been suggested in any of the government's papers, counsel did not have an opportunity to research the issue prior to argument. Subsequent research has disclosed that the contention that the United Mineworkers principle applies to orders to testify has been rejected by the Eighth Circuit in United States v. DiMauro, 441 F.2d 428, 436 (8th Cir. 1971). We submit that the reason in DiMauro -- that the only way for a witness to obtain review in a court of Appeals of an order to testify is by violating that order -- distinguishes this situation from that of other court orders.

4. A second claim asserted by the appellants which was summarily rejected by the panel sitting on November 25 was that the defendants had the right to take the stand in their own defense and at least state the religious motivations for their actions (without lengthy explanations) and that the trial judge's refusal to permit this

testimony deprived them of their constitutional right to present a defense. This was true even if the religious ground did not fully justify their actions. As we noted in a letter filed with the panel, the decision of the District Court rejecting this testimony conflicted with a decision of the Court of Appeals for the Fourth Circuit in United States v. Bowen, 421 F.2d 193, 197-198 (4th Cir. 1970). It also conflicted in principle with decisions of this circuit and other circuits recognizing that where intent is an issue in a criminal prosecution a defendant should be given wide latitude to take the stand and explain his own motivation. The trial here was a very brief one -- lasting only a few hours -- and it would hardly have extended that trial unduly to have permitted the appellants this small dignity.

WHEREFORE, the appellants request that the Petition for Rehearing be granted or, in the alternative, that this case be reheard by all the active Circuit Judges en banc.

Respectfully submitted,

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FOR THE SECOND CIRCUIT

DOCKET NOS. 74-2047 and 74-2127

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RICHARD HUSS and JEFFREY SMILOW,

Defendants-Appellants

APPLICATION FOR STAY OF THE MANDATE

Appellants hereby move for a stay of the mandate of this Court affirming the judgment of the district court in the above-captioned case during the consideration by this Court of the Petition for Rehearing and Suggestion for Rehearing En Banc, and as grounds therefor state as follows:

1. The issues presented in this appeal are substantial, and were so considered by a panel that had before it a bail application filed on behalf of the appellants on August 13, 1974.

2. The substantiality of the issue is demonstrated by the prosecution's last-minute injection of a new legal theory to defend the result reached by the district court.

3. A panel consisting of Circuit Judge Timbers, Retired Associate Justice Clark and Retired Circuit Judge Moore rejected the appellants' contentions out-of-hand on November 27, 1974. Other active Circuit Judges would, we believe, take a different view of the importance of this issue.

4. Appellants present no risk of flight. They have appeared for every court date and are now students in the New York area. If sentence is carried out immediately, they will be denied the opportunity to take final examinations and receive college credits for courses they have been taking during the Fall semester.

WHEREFORE, the mandate of this Court should be stayed pending decision on the Petition for Rehearing and for a 30-day period thereafter, if necessary, to enable counsel to file a petition for certiorari with the Supreme Court of the United States.

Respectfully submitted,

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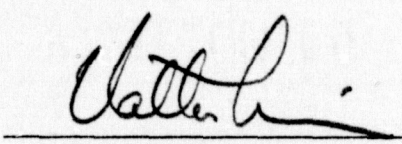
CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December 1974 I caused to be mailed, first-class postage prepaid, copies of Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc and Application for Stay of the Mandate to Assistant United States Attorney Robert Gold, Office of the U.S. Attorney for the Southern District of New York, U.S. Courthouse, Foley Square, New York, N.Y. 10007.



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